IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV06306

BETWEEN	**AUDREY ALLWOOD**	**CLAIMANT**
A N D	**ADMINISTRATOR GENERAL OF JAMAICA**	**1ST DEFENDANT**
A N D	**MEGA MARKETING LIMITED**	**2ND DEFENDANT**

Ransford Braham Q.C., Clayton Morgan and Stacey Salmon instructed by Clayton Morgan & Co. for the claimant

Mrs. Tana-Ania Small-Davis and Mikhail Jackson instructed by Livingston Alexander & Levy for the 2nd defendant

Ms. Kedia Delahaye and Ms. Geraldine Bradford for the1st defendant

Interim injunction – whether serious question to be tried – proprietary estoppel – promissory estoppel – adequacy of damages.

HEARD: 16th and 24th January 2014 and 28th February 2014

IN CHAMBERS

E. BROWN, J

On the 24th January, 2014 I handed down my decision refusing the application for an interim injunction. These are the reasons for doing so.

THE CLAIM

[1] Between 1999 and 2013, the claimant Ms Audrey Allwood and Damion Black shared a relationship which appears to have been both deeply personal and as well

outwardly commercial. To them a child was born, so they partnered in parenting and participated together in Jamaica's commercial life. Life, unfortunately, ended suddenly for Damion Black on the 10th July 2013. He died of congestive cardiac failure thirty-one (31) minutes after admission to the University Hospital of the West Indies. He was sixty-two (62) at the time of his death. The funeral service for Damion Black was held on the 18th July 2013. As will be seen, the commencement of litigation in this matter coincided with the funeral service.

[2] This Without Notice of Application for Court Orders (WNOACO) was filed on the 13th November 2013 along with the Claim Form and Particulars of Claim. The claim is for, *inter alia*, a declaration that the claimant is entitled to the beneficial interest (or such portion thereof as this honourable court may determine) in the property known as 9 Edgecombe Drive, Kingston 6 in the parish of St. Andrew, and registered at volume 1459 and folio 783 of the Register Book of Titles (the Edgecombe Property). The 2nd defendant is the registered owner of the Edgecombe Property. By the WNOACO the claimant seeks an interim injunction against the 2nd defendant, whether by itself, its servants and, or its agents from selling, transferring or disposing of the Edgecombe Property, or an interest therein.

[3] The WNOACO came before Simmons J on the 21st November 2013. This application rested on four grounds. Firstly, that the 2nd defendant advertised the Edgecombe Property for sale. Secondly, that the 1st and 2nd defendants represented to the claimant that the Edgecombe Property belonged to her and her two daughters. Thirdly, that if the Edgecombe Property is sold the claimant's interest will be forever defeated. Fourthly, that justice requires that an injunction be granted to protect the claimant's interest until trial.

[4] Although listed as a WNOACO, the 2nd defendant was represented at the hearing of the application and gave an undertaking "not to sell, transfer, or dispose of" the Edgecombe Property "or an interest therein until the hearing of this Notice of Application." Simmons J therefore adjourned WNOACO for hearing on today's date. The foregoing, however, does not represent the origins of the matter before the court and so a brief history of its journey through these hallowed halls is necessary.

BACKGROUND

[5] The claimant, then represented by Naylor and Mullings Attorneys-at-Law, first filed a Notice of Application for Court Orders (the July Application) along with supporting affidavit on the 18th July 2013. The other parties to that claim were Ryan Black, the 1st defendant and the Administrator General of Jamaica, the 2nd defendant. The July Application was filed in advance of a Claim Form and Particulars of Claim. In the July Application, the claimant sought the following:

1. That there be a mandatory injunction that an interim manager of Mega Marketing Limited be appointed by the Administrator General of Jamaica without delay.
2. That Ryan Black have no further dealings with the assets of the deceased intestate, Damion Black and the assets of Mega Marketing Limited, his servants and or agents until further order of this court or by written designation of the Administrator General of Jamaica,
3. That Ian Wong his servants and or agents, Ryan Black, his servants and or agents are hereby restrained from any dealings with the assets of Damion Black, deceased pending the intervention of the Administrator General.
4. That the 1st Defendant, Ryan Black do give an account of all monies received by him or taken on his order particular monies withdrawn from the National Commercial Bank and monies taken from Mega Marketing Limited situate in Kingston and St. Andrew.

[6] The claim for injunctive relief in the July Application was grounded on two bases. First, that Ryan Black may dissipate the assets before the matter proceeds to trial or may return to the United States of America where the judgment of this court will be unenforceable. Secondly, that Ryan Blake may put the proceeds of the estate beyond the reach of the claimant, thereby rendering any judgment she may receive useless.

[7] The July Application came before Cole-Smith J on the very day of its filing and the orders sought were granted with certain amendments. ‘Without delay’ was deleted from order one and substituted with, ‘within 28 days from the date hereof’. An order five was added granting the Administrator General Letters of Administration *ad colligenda*

bona for the estate of Damion Black. Order six required Ryan Black to deliver to the Administrator General all documents, including some which were particularized, and a firearm belonging to Damion Black.

[8] In the wake of these orders came a Notice of Application for Court Orders filed on the 19th July by the 2nd defendant against the claimant, wherein she was named Audrey Allwood-Barrett, (the defendant's July Application). The defendant's July Application was also filed ahead of the statement of case and was heard by K. Anderson J on the same day. K. Anderson J made orders whereby the claimant, her servants or agents shall not:

> *a. attend upon the business premises of Mega Marketing Limited (hereinafter referred to as "the company") at either of its branch offices;*
> *b. deal with any asset or property whatsoever of the Company whether located within Jamaica or not; and*
> *c. hold herself out to anyone or to any business entity whatsoever as having any legal or beneficial interest whatsoever in the Company.*

[9] At the adjourned *inter partes* hearing before Sharon George J, all the orders made by Cole-Smith J were discharged except for those granting Letters of Administration *ad colligenda bona* to the Administrator General and the claimant's undertaking. Additionally, Sharon George J ordered the claimant to pay to the 1st defendant, "Such sums as the Court hereinafter orders in respect of the First Defendant's losses by reason of the Order, including losses sustained by Mega Marketing Limited." The claimant was also ordered to pay Ryan Black's costs of the application after taxation or agreement. These matters remained unaddressed at the hearing before me.

THE AFFIDAVIT EVIDENCE

[10] In the claimant's affidavit of the 18th July 2013, that is, the evidence upon which the claimant relied to obtain the orders from Cole-Smith J, she said she lived with Damion Black for twelve (12) years in a common law relationship and together they operated Mega Marketing Limited, an import based business. The claimant operated Fit Farm Limited which Damion Black assisted with from time to time. They operated other businesses together and separately but Mega Marketing Limited and Fit Farm Limited were their main businesses and they depended on the incomes from both to pay their

bills and support their lifestyles. Additionally, they also hired managers to oversee the businesses and to ensure they were run properly.

[11] The claimant continued at paragraph six (6):

> *"Damion Black held the majority of the shares (100) in Mega Marketing Limited and managed the said company as a director. There were two other shareholders who held one share each in the company. His son, Ryan Black, who resides overseas, was a director and company secretary for Mega Marketing Limited. He played no active role in the day-to-day affairs of the company."*

After swearing to the fact of Damion Black's death one week earlier, the claimant continued, he left no will and his estate is unrepresented. The claimant went on to speak to the alleged dealings of Ryan Black and others with the assets of the deceased, including Mega Marketing Limited. At paragraph nine (9) the claimant said she devoted her time and energy to Mega Marketing Limited and that she managed it jointly with Damion Black for over ten (10) years. The claimant declared that she had put her life's savings as well as time and energy into Fit Farm Limited. She went on to assert that she has an interest in the property of both companies and in the assets of Damion Black as his common law spouse.

[12] The claimant continued, at paragraph twelve (12), that Ryan Black informed her that Damion Black remained a married man, that he the 1st defendant was now in control of the estate and only her child who was fathered by Damion Black was entitled to anything. The claimant went on to say that the assertion of Damion Black's marital status was a blatant lie. She had conducted a search of the court records for Miami Dade County and found the divorce record, which she exhibited.

[13] The claimant averred that Ryan Black lived and worked in Florida, USA and that were he to convert the assets and funds of Damion Black and Mega Marketing Limited to himself she would not be able to pursue him there. It was her understanding that Ryan Black intended to leave for Florida on the 19th July 2013. The claimant went on, that unless restrained, she believed "the Defendant will dissipate his father's assets and the assets of Mega Marketing Limited and Fit Farm Limited as well and render any judgment I receive herein fruitless."

[14] Ryan Black, filed an affidavit in response on the 29th July 2013. In that affidavit he, among other things, accused the claimant of a failure to make full and frank disclosure or misrepresentation as follows:

> ***The Claimant's Status***
>
> *"It appears from the claimant's affidavit that she asserts an interest in the Company and in the estate of Damion Black as his common law spouse. The Claimant asserts that:*
>
> *(a) She was involved in a relationship with Damion Black from 1999 to 2013;*
> *(b) That she lived with Damion Black for over 12 years in a common law relationship;*
> *(c) She intends to apply immediately for a declaration that she is under the law Damion Black's common law spouse.*
>
> *On the basis of these assertions, she persuaded the Court that she is a person interested in the estate of Damion Black who the Claimant asserts died intestate.*
>
> *As stated in the claimant's affidavit, her daughter was born on 14 November 2001. The claimant failed to disclose to the Court that she was married to Donovon Barrett on 19 January 2002, two months after the birth of her daughter. She also failed to disclose to the Court that she remained married to Donovon Barrett up until January 2013 and that during that time; she had held herself out to United States Immigration and Naturalization Services as being in a true marriage with Donovon Barrett. It therefore appears to me that the claimant has made false statements to this Honourable Court and to the United States Immigration and Naturalization Services.*
>
> ***Interest in the Company***
>
> *The claimant asserts an ownership in the Company and on that basis persuaded the Court that urgent orders were necessary to protect the assets of the Company. In paragraph 6 of the Affidavit, the claimant suggests that I am no longer a director of the Company and that I have been acting unlawfully and without any authority in my management of the business.*
>
> *In paragraph 8(b) the Claimant suggests that there is not [sic] management in place for the Company* as *"no shareholders meetings have been convened and no company resolution exists as per the legal requirements of the Companies Act."* And in paragraph 8(j)- *"the 1st Defendant has carried out the above activities without presenting evidence of a resolution from the shareholders of either company (Fit Farm Limited*

and Mega Marketing Limited). In any event the estate of Damion Black, the major shareholder and director of Mega Market Limited, remains unrepresented in these transactions."

In fact, as the claimant well knows and as the publicly available documents demonstrate, I am a director of the Company. I am advised by my attorneys-at-law and do verily believe that the management of a company rests with its board of directors and not with its shareholders. In fact, the Articles of Association of Mega Marketing Limited plainly states that to be the case.

"The claimant makes unsupported assertions that she is part owner of the Company and had been operating the business jointly with my father. She has been unable to provide any evidence of ownership, of being a director, or being involved in any aspect of management. As far as I am aware, the claimant did not even have keys to any of the locations. I have been unable to locate my father's briefcase, wallets and keys. I directly asked the claimant for my father's wallet and briefcase and she responded that that is all I have for him and she would discuss this after the funeral.

Inability to pursue me in Florida

The claimant asserted to the Court that I am busy converting assets and funds of my father and the Company and that because I live and work in Florida, she will not be able to pursue me in Florida. This was to persuade the Court that it needed to act to protect assets which may be put out of the reach of the jurisdiction of the Court and out of the claimant's reach.

The Claimant failed to disclose to the Court that she holds residency in the United States of America, that she files the tax returns there and that if the need ever arose, which I am sure that it would not, the Claimant is well able to pursue action and has access to the courts of Florida, USA."

[15] The claimant's responses to these allegations are contained in her affidavit filed on the 30th July 2013, by Naylor and Mullings, the claimant's Attorneys-at-Law. The responses are quoted below:

The Claimant's Status

"In response to paragraphs 26 to 28 of Ryan Black's 1st Affidavit I aver that:

(a) At the time of making the application for injunction I had not understood the significance of my marriage to Donovon Barrett from whom I am divorced. The marriage broke down a long time ago. At the time of the

application for the ex parte injunction I was grief stricken and I was not able to recall all the details required by my attorney-at-law.

(b) That I have invested in this company and as such I have filed this injunction to prevent the dissipation of the assets of the deceased and of the company (Mega Marketing Limited) of which he is the main shareholder.

(c) That I have the authority of Geraldine Pinnock, a shareholder in the company and a subscriber to the Memorandum of Association to represent her issues while the ***1st Defendant's status as a purported first director is in issue.****"*

Interest in the Company

"I have put millions of dollars into properties owned by Mega Marketing Limited as such I am an investor and creditor of that company. The injunction is intended to protect my investment. These receipts are currently locked away from me but I am confident that I will access them from a secondary source on or before the 14th of August 2013."

"That in response to paragraphs 30 to 33 of Ryan Black's first Affidavit I aver that:

(a) I represent the interests of the only known subscribers to the Memorandum of Association and I rely on the power of attorney exhibited at "AA9" in support of this.

(b) It is unclear how the documents which the 1st Defendant relies on came to be filed. He cannot rely on these documents as they are not signed and prepared by the prescribed method in the Companies Articles of Association.

(c) It is his actions that negatively impact the Companies credit rating because of provisions under the Companies Act.

(d) In the circumstances the shareholders are entitled to meet and to elect new directors and a new management team for the company.

(e) The items I have which bear the signature of the deceased (from his wallet and briefcase) have been sent for forensic analysis as I have reason to believe that some of signatures on record at the office of the Registrar of Companies may not be that of Damion Black. In any event these items do not belong to Ryan Black they are to be given to the Administrator General's Department."

Inability to pursue Ryan Black in Florida

"That I am advised by my attorney and believe that if the 1st defendant took the assets of the company and went overseas there is a great chance I would not have been able to pursue a lawsuit in the United States because of the legal doctrine of ***Forum Non Conveniens*****.**

My status as a Florida resident is not relevant to this lawsuit."

[16] Messrs Clayton Morgan and Company filed a fresh affidavit on behalf of the claimant on the 13th November 2013. In this affidavit the claimant maintained that she cohabited with Damion Black for twelve (12) years at 24 Fairfax Drive, Kingston 19, St. Andrew. That in or about 2012 it came to her attention that the Edgecombe Property was being offered for sale. She made visits to the property, alone and in the company of Damion Black, following which she indicated to him that she would like to purchase the property and he assented.

[17] At paragraph sixteen (16) she said Damion Black advised her "prior to ... and during the negotiations for the purchase ... that the Edgecombe Property was being purchased for [her] two daughters and [herself]." The claimant further swore that the Edgecombe Property was bought in the name of the 2nd defendant as, according to Damion Black, being a man of sixty-two (62) years he would have experienced difficulty in obtaining a mortgage in his name.

[18] In addition to contributing Two Million Dollars ($2,000,000.00) of the initial Seven Million Dollars ($7,000,000.00) payment, she consulted with and instructed architects to prepare drawings for the renovation and expansion of the Edgecombe Property. The remainder of the purchase price was mortgage financed. It was the claimant, so she swore, who contracted and paid the builder, Jomo Palmer, the sum of Fifteen Million Dollars ($15,000,000.00) from her own resources for work already done on the property. The claimant expressed the fear that unless restrained, the sale of the Edgecombe Property will proceed in advance of the determination of her rights therein.

THE CLAIMANT'S SUBMISSIONS

[19] On the question of whether there is a serious question to be tried, Mr. Braham Q.C. submitted on behalf of the claimant thus:

"When considering whether or not to grant an application for an interim injunction, the decision of the House of Lords in ***American Cyanamid Co. v Ethicon Ltd. [I975] AC 396*** *stipulates that the Court should as a general rule have regard to the following criteria:*

i. *Is there a serious issue to be tried?*

ii. *Are damages an adequate remedy for the applicant for the loss he would have sustained as a result of the respondent continuing to do what which was sought to be enjoined between the date of the application and the date of the trial?*

iii. *If so, would damages be an adequate remedy for the respondent for the loss he would have sustained by being prevented from so acting between the date of the application and the date of the trial?*

iv. *If there is doubt as to the adequacy of the respective remedies, where would the balance of convenience lie?*

v. *Are there any special factors?"*

Lord Diplock outlined the test at pages 407 G to 408 F as follows:

"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that " it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing ": Wakefield v. Duke of Buccleugh (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the

time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

"It was further held by the Privy Council in ***National Commercial Bank Jamaica Limited v Olint Corp. Limited Privy Council Appeal No 61 of 2008*** *as per Lord Hoffmann at paragraphs 17 -18 that:*

"The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [I9751 AC 396,408:

> *"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."*

Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

Additionally, as established by the Court of Appeal in ***Pride of Derby and Derbyshire Angling -Association Ltd v British Celanese Ltd [l953] Ch. 149,*** *a person who establishes that his proprietary rights are being wrongly interfered with, is prima facie entitled to an injunction. Lord Evershed MR stated at page 181 as follows:*

> *"It is, I think, well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered."*

Philip Pettit, the learned author of ***Equity and the Law of Trusts, 6th Edition*** *set out the following as the main illustrations of special circumstances which have to be taken into account:*

a. *Delay and acquiescence -if the claim itself is barred.*

b. *Clean hands -the principle expressed in the maxim 'he who comes into equity must come with clean hands' applies.*

d. *Third parties -owing to the fact that it is an equitable remedy, the court in deciding whether or not an injunction should be granted may take into consideration the effect that the grant of an injunction would have on third parties.*

It is submitted that the claimant's claim herein raises serious issues to be tried. The 2nd defendant has disputed a number of the claimant's assertions by way of several Affidavits filed herein which demonstrates that there are in fact serious issues to be tried. Lord Diplock in ***American Cyanamid Co. (supra)*** *stated at 406 paragraph C as follows:*

> *'My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; ...'*

The claimant claims that she is entitled to the beneficial interest in property situate at 9 Edgecombe Drive, Kingston 6 in the parish of Saint Andrew

registered at Volume 1459 Folio 783 of the Register Book of Titles (the Edgecombe Property). Alternatively, that she and her two daughters are entitled to the beneficial interest or such portion thereof as this Honourable Court may determine in the Edgecombe Property.

The claimant expended a significant sum of money in acquiring the Edgecombe Property. She thereafter caused substantial improvements to be made to the property relying on the assurance made to her by Damion Black, deceased, that the property was being purchased for herself and her two daughters. It is our submission that the claimant's abovementioned conduct and actions thereby created an entitlement to a proprietary right in the Edgecombe Property.

Prior to the purchase of the Edgecombe Property and during the negotiations for the purchase, Mr. Black advised Ms. Allwood that the Edgecombe Property was being purchased for herself and her two daughters, Ashley Grant and Allyanah Black. Mr. Black often repeated this statement during the period of construction and in addition made this statement to mutual friends and acquaintances of theirs. See paragraph 16 of Affidavit of Audrey Allwood in support of Application for Interim Injunction filed November 13, 2013 and attached exhibits "AA5", "AA6" and "AA7".

The 2nd defendant however contends that the property was purchased by Damion Black as an investment. See paragraphs 7 and 9 of Affidavit of Earl Thomas filed December 6, 2013; paragraph 6 of First Affidavit of Angella Hayden filed December 6, 2013; paragraph 23 and 25 of First Affidavit of Ryan Black filed December 6, 2013. The Edgecombe Property was bought in the name of Mega Marketing Limited as a matter of convenience because as Mr. Black explained to Ms. Allwood that by virtue of his age he would not have been able to obtain a mortgage in his name.

During his lifetime Mr. Black was the owner of the entire beneficial interest of Mega Marketing Limited. It is submitted that Damion Black, by his words and conduct, lead [sic] Audrey Allwood to believe that he would not insist on his strict legal rights in relation to the property, knowing or intending that Ms. Allwood would act on that belief. Ms. Allwood and Mr. Black purchased the property for $38,000,000.00. An initial payment of $7,000,000.00 was paid, $2,000,000.00 by Ms. Allwood and the balance by Mr. Black. The balance purchase price was obtained by way of mortgage from the National Commercial Bank.

Ms. Allwood, on the understanding that the Edgecombe Property was purchased for herself and her two daughters, consulted with architects, Plexus Limited and presented to the architects a brief for the renovation and expansion of the Edgecombe Property. Consequent on these instructions, the architects produced drawings for the said property, and

having obtained the drawings and the architects' direction, Ms. Allwood engaged the services of a builder, Mr. Jomo Palmer, for the carrying out of construction works. The estimated cost of the renovation and expansion of the Edgecombe Property was approximately $57,441,177.00.

It was decided that the renovation and expansion would be done on a phased basis and the works started shortly after the Agreement was made between Ms. Allwood and the builder, Mr. Palmer. The cost of the renovation was paid entirely by Ms. Allwood to Mr. Palmer. This is also contested by the 2nd Defendant. See paragraph 13 of First Affidavit of Angella Hayden filed December 6, 2013; paragraphs 28 and 32 of First Affidavit of Ryan Black filed December 6, 2013. The approximate sum paid to date is $15,000,000.00 and the renovation and expansion of the Edgecombe Property is now approximately 40% complete. Ms. Allwood also supervised Mr. Palmer. It is submitted that Ms. Allwood, in incurring the abovementioned expenses and overseeing the improvements to the property, acted to her detriment and/or altered her position for the worse.

2ND DEFENDANT'S SUBMISSIONS

[20] The following submissions were made behalf of the 2nd defendant. The undisputed facts are that the Edgecombe Property was purchased by and is registered in the name of the 2nd defendant who has complete ownership over the said property. The claimant also admits that the property was purchased by the 2nd defendant who has sole control and possession over the said property. The 2nd defendant therefore possesses an indefeasible title to the Edgecombe property under the *Registration of Titles Act.*

[21] The claimant bases her interest in the Edgecombe Property on: (a) a representation she alleges was made to her by Damion Black that he would purchase the property for her and her two daughters, Ashley Grant and Allyannah Black; and (b) on her personal expenditure of Fifteen Million Dollars ($15,000,000.00) on the Edgecombe Property. Contrary to the claimant's assertion, the 2nd defendant contends that the Edgecombe Property was bought for the purpose of investment, to be specifically utilized to generate income for the Company. This is supported by the Affidavits of Ryan Black, Angella Hayden and Earl Thomas, along with supporting exhibits.

[22] The 2nd defendant accepts that the court ought not to go into a mini trial of the

disputed facts on each side. However, the Court is entitled to come to a view of whether it is plausible that the claimant would have expended Fifteen Million Dollars ($15,000,000.00) (proof of which has not been provided) on a property which was not registered in her name. Further, the allegation that Mr. Black, who is no longer here to confirm or refute the allegation, purchased the Edgecombe Property for the claimant and her daughters, yet placed the title for same in the name of the 2nd defendant, when both he and the claimant knew that the claimant had no legal or beneficial interest in the 2nd defendant, is highly improbable. The claimant and Mr. Black were co-owners and co-directors of another corporate vehicle, Fit Farm Limited in whose name the Edgecombe Property could easily have been placed to achieve the objective that the claimant asserts as being Damion Black's intention.

[23] The credibility of the claimant's sworn evidence is in serious question. In other proceedings she has claimed to be a part owner of the Company. She has even gone so far as to acquire a Power of Attorney from the other two nominal shareholders in whose name one (1) share each was registered as a matter of convenience by the lawyer when incorporating the Company. The 2nd defendant submits that this fact alone should call into question the whole bona fides and credibility of the claimant's case.

[24] It must be noted that a fiduciary duty is owed by directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors. See ***Winkworth v Edward Baron Development Co Ltd and others [1987] 1 ALL ER 114.*** It is trite law that directors of a company have a duty to the company. Lord Greene MR in ***Smith & Fawcett Ltd. [1942] ALL ER 542*** said at p. 543, that directors of a company must act: "...bona fide in what they consider -not what a court may consider -is in the best interests of the company, and not for any collateral purpose"

[25] It was therefore submitted that were Mr. Black, the deceased purporting to exercise his powers as director to the benefit of the claimant and her children, he would have been in breach of his fiduciary duties to the Company. The evidence in support of

the 2nd defendant's case clearly asserts that the deceased was acting in the best interests of the Company, as a director would have, when he made the investment in the Edgecombe Property. Moreover, when the Court considers the matter, the following aspects are instructive:

> *"(a) the claimant is not a shareholder or director or other officer of the 2nd defendant; she had no singing authority on any of its bank accounts. She was not involved in the transaction to purchase the Edgecombe Property, whether by meeting with the lawyer who had conduct of the purchase or with the bank in the course of negotiating the mortgage loan; (b) The claimant has been unable to produce any evidence for payment of a single dollar out of the $15 Million Dollars she asserts that she has spent on the Edgecombe Property; (c) the Claimant has laid out inconsistent positions as it relates to the interest the she is claiming in the Edgecombe Property."*

REASONING

[26] The submissions on the applicable law on both sides of the litigation divide are together fulsome and need not be repeated. I accept that the first hurdle the claimant/applicant has to cross is to establish that there is a serious question to be tried. Mr Braham Q.C. ably articulated an answer in the affirmative. On the contrary, Mrs Small-Davis contended that in this the claimant has utterly failed. In order to answer this question, the court must determine, without attempting to resolve disputed questions of facts between the parties, whether the claimant's claim is so replete with inconsistencies that it sits on such an uncertain factual basis, rendering the claim frivolous or vexatious, in the sense that no reasonable person could treat it as bona fide.

[27] At the very outset, for the avoidance of doubt, I wish to state that any conclusions the court appears to draw are entirely provisional and in no way represent an attempt to resolve factual issues between the parties. What follows is an assessment of the affidavit evidence provided by the claimant, with only necessary incidental reference to that emanating from the 2nd defendant/respondent. The exercise is being conducted to ascertain with particularity the right the claimant asserts, and for which she prays in aid the intervention of the court to prevent its infringement.

[28] In her July Application the claimant contended for an interest in Mega Marketing Limited and the estate of Damion Black, primarily on the fact of her purported common law spousal relationship and, secondarily joint management of Mega Marketing Limited. So, the right to be protected was a right to share in the assets of both Mega Marketing Limited and the estate of Damion Black, which sprung essentially from her status as spouse. The court was therefore asked to intervene to prevent the dissipation of those assets.

[29] The attack upon the substratum of that claim was as swift as it was devastating, and fact became fallacy. That the claimant remained a married woman up to January 2013 was revealed by Ryan Black. I do not accept the claimant's explanation for what was a clear absence of frankness for two reasons. First, it is implausible that the claimant was unaware of the significance of failing to disclose her own marital status in the context of her July Application. Immediately before the claimant deposed that she lived with Damion Black for twelve (12) years in a common law relationship, the claimant compendiously articulated Damion Black's marital status. The perspicuity with which the claimant sets out Damion Black's marital status betrays a mind sufficiently perspicacious on the subject. Hence, the fact of her own marital status, if not its significance, most likely was foremost in her mind.

[30] Secondly, the claimant's averred amnesia arising from being grief stricken flies in the face of the flurry of activities at or around the time Damion Black was being buried. The affidavit supporting the July Application was sworn to on the day before the funeral and instructions were given to alert the Administrator General to act in the estate. This affidavit is eighteen (18) paragraphs long, with paragraph eight (8) having ten (10) sub-paragraphs particularising alleged interference with Damion Black's assets and business interests. It would not be over stating the case to describe this affidavit as detailed. So, the one detail that remained shrouded by the pall of grief that had descended on the claimant was the glaring fact of her marital status which had been so recently addressed as the January of the year Damion Black died.

[31] When Naylor and Mullings filed the accompanying statement of case for the July application, the claimant declared herself to be an investor and creditor of Mega Marketing Limited. The claimant certified as true that she had invested $15,000,000.00 in the improvement of assets in the name of Mega Marketing Limited, and that the company remained indebted to her. This did not change when her present Attorneys-at-Law filed an amended Particulars of Claim. So, whereas the right to be protected at the time of the July Application was essentially spousal, by the ultimate day of that month the right had morphed into investor and creditor.

[32] It was in the application before me that the claimant laid claim to a specific asset belonging to Mega Marketing Limited for the first time. In other words, in all the legal wrangling that took place between July and the filing of the present application on the 13th November 2013, it did not occur to the claimant that she had a proprietary claim in the Edgecombe Property as an investor and creditor. To encapsulate, the claimant's position began as a spouse then moved to that of an investor/creditor where she obtained a power of attorney and issued a notice of an extraordinary general meeting to be convened at the offices of Naylor and Mullings, before finally settling on rights arising in equity. The interest in the Edgecombe Property arises from the twin interposition of equity, proprietary and promissory estoppels. In fairness to her, perhaps her retentive capacity was impaired by grief. The recency of the claim to proprietary and promissory estoppels themselves raises doubt about the claimant's *bona fides.*

[33] While it may be argued that to say the claimant invested Fifteen Million Dollars ($15,000,000.00) in the improvement of the assets of Mega Marketing Limited is not very different from saying she expended that very sum in the renovation of the Edgecombe Property, an examination of the alleged sums reveals a different story. In the first place, the investment sum is stated to be Fifteen Million Dollars ($15,000,000.00). The sum expended on the Edgecombe Property was at least Seventeen Million Dollars ($17,000,000.00), when the claimant's share of the deposit is added. However, the amount paid to Jomo Palmer is unclear.

[34] In her first affidavit the claimant said the cost to date is approximately Fifteen Million Dollars ($15,000.000.00) for the work done. A letter is exhibited from Jomo Palmer saying he received this sum from her and speaking to an outstanding balance of Four Million Four Hundred Sixty-Eight Thousand Four Hundred and Ninety Two Dollars and Ninety-Five Cents ($4,468,492.95). However, in her second affidavit the claimant said, “I paid an initial $15 million using my own money and I paid Mr. Palmer $1 million approximately every 3 weeks.” As Mrs Small-Davis submitted, on a rough estimate the claimant would have paid approximately Twenty Million Dollars ($20,000,000.00) to Jomo Palmer, yet Mr Palmer said he received Fifteen Million Dollars ($15,000,000.00). Interestingly, the statement of account provided by Mr Palmer shows the receipt of One Million Dollars ($1,000,000.00) at ten (10) to twelve (12) days intervals, not the approximate three weeks the claimant swore to.

[35] Leaving aside the question of the actual amount paid to Jomo Palmer, another pertinent issue is the method by which the payments were made. While the Jamaican economy is notoriously cash-based, making the payment of Fifteen Million Dollars ($15,000,000.00) in cash is not an impossible though unlikely event, a prudent businesswoman such as the claimant would certainly have insisted on the evidence of even a sliver of paper. By that I mean a document executed by the recipient and herself at the time of payment, not a letter several months postdating the death of Damion Black coming from the recipient. Even if the payment was by cash, was it retrieved from a financial institution or a private and intimate place from which no paper trail could be expected? And if this payment was not by cash, was it by a personal, manager’s or cashier’s check? The court is therefore left in the position where uncertainty undergirds both the fact of payment and the amount that was paid.

[36] So, on the claimant’s own evidence she meandered her way to the present assertion of a beneficial interest in the Edgecombe Property. That the Edgecombe Property was promised the claimant and her children rests on no firmer foundation than the claimant’s say so, supported by the say so of three witnesses. These assertions have been traversed by the defence and no attempt is being made to resolve this conflict. However, an observation is pertinent. While it is true that couples are notorious

for the informality that imbues their commercial arrangements, proceeding on the basis of mutual trust, this was no ordinary couple. The claimant and Damion Black were both experienced in business and in the ownership of property. Therefore, it is disappointing that Damion Black's much publicised intention that the Edgecombe Property was purchased as a home for 'his girls' is not embodied on a sheaf of paper. This is especially so when viewed against the silhouette of Damion Black's wishes to ensure the continued payment of the mortgage 'if anything were to happen to him' (Second affidavit of Audrey Allwood, paragraph 20).

[37] This leads to another thorny aspect of the question of whether there is a serious question to be tried. The alleged representations are all attributed to Damion Black, not Damion Black qua director of Mega Marketing Limited. However, according to the submissions made on behalf of the claimant, "for all intents and purposes, Mega Marketing Limited and Mr Black were one and the same." In other words, Mega Marketing Limited was merely Damion Black's alter ego. As I understand the submission, in essence it seems to be this, the corporate personality of Mega Marketing Limited and that of the natural person Damion Black the 100% beneficial owner of Mega Marketing Limited and its managing director, became fused, and so any representation made by Damion Black is at once attributable to Mega Marketing Limited.

[38] This raises the question of separate legal personality of a corporate entity from that of its members. This separation has been recognised in English law from the House of Lords handed down its seminal decision in ***Salomon v Salomon & Co [1897] A.C***. 22. To make Mega Marketing Limited liable for the acts of Damion Black, the corporate veil would have to be lifted. A brief survey of judicial history since ***Salomon v Salomon*** reveals a reluctance to pierce the corporate veil except in limited circumstances. Apart from the bald assertion that the company was, as it were, Damion Black's second self, no argument was advanced before to show why this should give cause for the lifting of the corporate veil. Was Mega Marketing Limited a facade or sham corporation through which the dealings of Damion Black were funnelled? Surely, the contention that the maintenance of the family was done through the company does not amount to Mega Marketing Limited being a facade or a sham corporation. In addition, it was not the

claimant's contention that any impropriety attached to the registration of the Edgecombe Property in the name of Mega Marketing Limited.

[39] Even taking the most generous view of this submission, it does not purport to argue that Damion Black was the agent of Mega Marketing Limited. To do so there would have to be an admission of the separate legal personalities of the artificial person and the natural person. Otherwise it would be hopeless to advance an agency relationship because that relationship acknowledges a principal and an agent, separate entities. On the claimant's submission, Damion Black was simultaneously agent and principal. In any event, this would require strict proof in the absence of any agreement making Damion Black the company's agent as there is no presumption of agency between a company and its members: ***Gower and Davis Principles of Company Law*****,** 8th edition page 206 para 8-10.

[40] So, nothing having been advanced to show that the corporate veil should be lifted, the representations, such as there might have been, remain those of Damion Black qua Damion Black and not those of the 2nd defendant, Mega Marketing Limited. There is therefore an unbridgeable chasm between asserting that Damion Black made representations which it would be unconscionable to allow him to avoid, and saying the 2nd defendant was part and parcel of those representations. Since the legal and beneficial owner of the Edgecombe Property made no representation to the claimant, the twin interposition of equity, proprietary and promissory estoppels, simply do not arise.

[41] Further, it is more than a little curious that the claimant, having obtained an interim injunction which was subsequently discharged, has not sought to pursue that claim to the end but has now filed a new claim with the intention of obtaining that which the court has declared by the discharge of Cole-Smith J's order, that she has no right to. I hold that the antecedent meandering nature of the claim to an equitable interest in the Edgecombe Property has imbued the claim with the character of the proverbial house built on sand. Additionally, the effort to collapse the personalities of the 2nd defendant and Damion Black having woefully failed, there is no substratum for the claimant's

interest as presently framed. In short, the foundation of the claim is so uncertain that its bona fides are covered with too thick a veil of doubt. That veil is too impervious to be pierced by the equity's lance of fairness, although the Chancellor throws it Herculean force and the precision of a surgeon. It bounces off the claimant's case as if the effort had been made to penetrate the shell of a tortoise with a rye blade of grass.

[42] In considering the application in the manner that I have, the likelihood of having ran afoul of the prohibition against commenting on the merits of the case before the trial did not fall outside my contemplation: **Wakefield v Duke of Buccleugh *(1865) 12 L.T. 628, 629.*** However, the learning imparted from that case is not a command to turn a blind eye to obvious weaknesses in the claimant's case, such as have been articulated above. Rather, the court is enjoined to avoid making an assessment on the case as a whole involving the weighing of evidence from both sides. For surely it is recognised that the case presented at the interlocutory stage may be improved upon, for example through discovery, by the time of the trial.

[43] However, such improvement appears to sound in the vein of perfecting the evidence to be relied upon in substantiating the claim. Such sea changes as the basis of the right sought to be protected, or the nature of the right itself, could hardly have been in the contemplation of Lord Diplock in ***American Cyanamid***, *supra* or the court in ***Wakefield v Duke of Buccleugh***, *supra*. Hence, the lack of constancy in the basis of the right claimed, or the very right itself, as in the instant case, ought properly to be a pertinent consideration. Accordingly, without seeking to assess the claimant's credibility on the basis of affidavit evidence only and that at the interlocutory stage, in deciding whether there is a serious question to be tried the court is indeed pronouncing upon the merits of the claimant's case, though not on the case as a whole. Having examined the material presented by the claimant, both the shifting nature of the right asserted and separately the questions of estoppels, I have been driven to the view that there is no serious question to be tried.

[44] In the event that I am wrong in so holding, I go on to consider the question of the adequacy of damages. The submissions made on behalf of the claimant in this regard are reproduced immediately below:

1. Considering the relief being sought and the issues raised in the statements of case, it is submitted that an award of damages will not be an adequate remedy for the Claimant.
2. The Jamaican Court of Appeal in ***Mavis Rodney v lane Rodney-Seale and Leleith Rodney-Roberts (1994) 31 JLR 674 (CA)*** confirmed the view that interests in land are rights which persons are entitled to protect by way of injunctions and caveats. Forte JA stated the following at page 684 of the judgment:

> *In this regard, a passage cited by Mr. Miller for the respondents, from the text "Registration of Title to Land throughout the Empire" by James Edward Hogg, M.A., Oxon dealing with the Torrens system throughout the Commonwealth including Jamaica is of significant relevance. It reads:*
>
> > *'The necessity for protecting unregistered interests by means of injunctions, and the close resemblance that the caveat bears to an injunction, justify the general principle of giving an extended meaning to the 'interest' which will support a caveat. It must of course be borne in mind that (as already pointed out ante, P. 173) 'interest' includes a claim to an interest; the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests, and of interests that have not yet become actual interests in the land.'*

In my view, there is, in the affidavits overwhelming evidence that demonstrates ample reasons why the caveat should not be removed until there is a resolution of all the issues of fact, law and equity, in the appropriate jurisdiction. Mr. Miller's citation from ***Re Moosecana Subdivision***, and ***Grand Trunk Pacific Branch Lines 7 D.L.R. 674 at page 679*** is -most relevant. It reads:

> *"If there is any bona fide question of law or equity to be decided as to the right of the caveator to the estate or interest claimed under the caveat, such question should be disposed of in an action, and the caveat should be continued for a sufficient time to allow an action to be brought in which to decide such question: **Gaar Scott Co. v. Guigere**, 2 S.L.R. 374."*

[45] Downer JA went on to say at pages 690 -691:

> *“So for the test laid down for the caveator to "show cause why such caveat should not be removed", Mr. Miller cited yet another passage from Hogg's text which is appropriate. It reads thus at page 184:*
>
> > *‘The expression 'interest' or 'interested' in land occurs in every one of the enactments by which the caveatable interest is defined, except in the Leeward Islands. -where a caveat may be entered by 'any person entitled to stay the registration.' The latter phrase would seem to mean that a claim to any defined right relating to the land and enforceable against its owner will be sufficient caveatable interest. This is in fact a possible interpretation of 'interest' in all jurisdictions, and has received judicial sanction in at least one -Federated Malay States, where the 'wide and comprehensive' wording of the enactment is referred to. That the words of a corresponding enactment authorizing the entry of caveats 'should have a wide interpretation given to them' has also been laid down in New Zealand. The necessity for protecting unregistered interests by means of injunctions, and the close resemblance that the caveat bears to an injunction, justify the general principle of giving an extended meaning to the 'interest' which will support a caveat. It must of course be borne in mind that (as already pointed out ante, p. 173) 'interest' includes a claim to an interest; the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests, and of interests that have not yet become actual interests in the land.’*
>
> *When the principle expressed in this passage is applied to the facts adduced in the caveator, lane's affidavit, it is clear that she has "shown cause why the caveat should not be removed.’”*

[46] Mr. Braham Q. C. submitted that the claimant demonstrated her proprietary and/or beneficial interest in the Edgecombe Property for which damages will not be an adequate remedy if the property is sold. Based on the foregoing, it was submitted that the balance of convenience weighs heavily in the claimant's favour as she will be left without a home for herself and her two daughters in the event the defendants are permitted to sell the Edgecombe Property.

[47] Mrs Small-Davis’ submission on the question of the adequacy of damages is quoted below:

> *“In the event that the Court does not accept this submission and finds that there is a serious issue to be tried, it is submitted that an injunction ought*

> *not to be granted nor should the undertaken given be continued by reason of the fact that the Claimant has not proved that damages are not an adequate remedy. If the Claimant is to succeed on her claim, it is submitted that damages are readily quantifiable and so would be an adequate remedy. Also, the Claimant would be in a position to purchase a replacement property, especially since what is at stake is an unfinished uninhabitable concrete structure and the building plans are available to be replicated on any suitable vacant lot."*

[48] So then, would damages be an adequate remedy if she were to succeed on her claim? A good place to start is with a quotation from the judgment of Lindley L.J. in ***London & Blackwall Railway Co. v Cross (1886) 31 Ch. D 354, 369***, " the very first principle of injunction law is that prima facie you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy." So, like all other equitable remedies, an injunction is only available where compensatory damages would be inadequate. As Lord Diplock said in ***American Cyanamid Co. V Ethicon Ltd [1975] AC 396, 408***, "if damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage." The emphasis is mine. The reason for this has been so long established that it is now trite. That is, equity will only step in to do justice where the common law has provided no remedy. According to the learned author of **The Principles of Equity and Trusts**:

> *"Compensatory damages will be inadequate if no damages are available at Common Law for the infringement of the particular wrong, if damages would be nominal or small, if the loss would be difficult to quantify, or if the damages would only compensate for past loss and not for the loss that might arise in the future. Damages would also be an inadequate remedy if the defendant were unable to pay it."*

[49] In respect of the difficulty to assess damages, the learned authors of **Blackstone's Civil Practice The Commentary 2012** at para. 37.23 supply the following examples: loss of goodwill ***(Foseco International Ltd v Fordath Ltd [1975] FSR 507),*** disruption of business ***(Evans Marshall and Co Ltd v Bertola SA [1973] 1WLR349)*** and where the defendant's conduct has the effect of killing off a business before it is established ***(Mitchelstown Co-operative Society Ltd v Societe des Produits Nestle***

SA [1989] FSR 345.

[50] Damages would also not be an adequate remedy where:

1. The wrong is irreparable, e.g. suspension from a professional post ***(Watson v Durham University [2008] EWCA Civ 1266, LTL 24/10/2008)***, loss of the right to vote.

2. The damage is non-pecuniary, e.g. breach of an arbitration clause ***(Starlight Shipping Co. V Pai Ping Insurance Co. Ltd, Hubei Branch [2007] EWHC 1893 (Comm), [2008] 1 All ER 593***, libel, nuisance, trade secrets.

3. There is no available market. In ***Howard E. Perry and Co. Ltd v British Railways Board [1980] 1 WLR1375*** the defendant refused to allow the claimant to remove a consignment of steel during a steelworkers' dispute. The claimant sought an order that the defendant permit the claimant to remove it. As steel was otherwise unobtainable at the time, damages were not an adequate remedy.
   (**Blackstone's Civil Practice The Commentary 2012** para. 37.23)

[51] Mr Braham's written submission on behalf of the claimant amounts to this, since the claimant has demonstrated her proprietary interest in the Edgecombe Property damages would not be an adequate remedy. In fact, one of the grounds upon which the injunctive relief is being claimed is, "if the Edgecombe Property is sold the claimant's interest will be forever defeated." In her affidavit filed on the 18th December 2013, at paragraph twenty-seven (27) the claimant said, among other things, "I have an emotional attachment to the Edgecombe Property and always had the expectation that I would acquire an interest in the property. In light of this, money would not provide an adequate remedy."

[52] To bolster this position reference was made to ***Mavis Rodney v Jane Rodney-Seale and Leleith Rodney-Roberts*****,** *ibid*, (**Mavis Rodney**)**.** I understand that reference to be an attempt to show that the court leans toward the grant of injunctive relief where the subject matter of the claim is land. Indeed, in his oral submissions Mr. Braham Q. C.

put forward the proposition that a failure to grant the injunction would rob the trial court of one of the remedies that would have been otherwise open to it, if the land was sold *ad interim*. That is, the court could not compel the 2nd defendant to transfer the property to the claimant.

[53] I respectfully disagree with learned counsel that **Mavis Rodney** is an authority for that proposition. In **Mavis Rodney** the court was concerned with the removal of a caveat lodged by the respondents to prevent unregistered land being brought under the **Registration of Titles Act**, upon the application of the appellant. The unregistered land was devised to a number of beneficiaries, including the respondents. The appellant was the widow and one of the executrixes of Percival Rodney, another beneficiary and sole executor under the will of Henrietta Rodney from which the devise flowed. At the time of the case the administration of the estate of Henrietta Rodney was incomplete.

[54] The issue before the Court of Appeal was whether the beneficiaries had a claim to portions of the land Percival Rodney had appropriated to himself. Percival Rodney's allotment to himself was plainly to the disadvantage of the other beneficiaries, on the affidavit evidence. The resolution of the issue turned on a construction of Henrietta Rodney's will. Henrietta Rodney indicated in her will she wished the subdivision of the land to be by agreement of all the beneficiaries. Wright J.A., at page 681, summed up the view of the court:

> *"To regard the land the subject of the caveat as Percival's would be to give judicial sanction to what, in my opinion, was an act of malfeasance on the part of Percival when he obviously preferred himself by taking possession of over five acres of the more valuable portion of the land and for another seven years up to the time of his death there were beneficiaries who had been given no allotment."*

[55] It is against this background that the passages cited from the judgments of Forte J.A. (as he then was) and Downer J.A. must be understood. Indeed, Forte J.A.'s conclusion before citing the quoted passage, at page 683, makes this plain. The learned Justice of Appeal said:

> *"In my view, the evidence disclosed in the affidavits leave it abundantly clear, that the administration of Henrietta's estate has not been completed,*

> *and more importantly, the beneficiaries, some of whom have never benefitted from the estate, have never been in agreement with the purported allotment attempted by Percival and in particular an allotment to himself of so many acres abutting the main road.*
>
> *Consequently, I would conclude, that to allow the registration to proceed in the face of these allegations would as the respondents contend, deprive the beneficiaries of their chance to place before a Court, all the evidence, in order to determine the manner in which the administration of the estate should now proceed, given the death of Percival, and the inactivity in its administration since then".*

[56] Although the Court of Appeal recognised the right of the beneficiaries to protect their interest, giving that word its widest meaning, it was not laying down as a general principle the inadequacy of damages where an interest in land is claimed, be it 'proprietary and/or beneficial'. What the Court of Appeal adjudicated was whether the caveator had shown cause, which is analogous to a claimant showing that there is a serious question to be tried on an application for an injunction. The question of whether the alternative remedy in damages would have been available to the respondents at the trial of the claim was never argued before the Court of Appeal.

[57] This court is aware of at least one instance in which there is a prima facie entitlement to an injunction where the subject matter is land, which is the converse of saying damages would be an inadequate remedy. This is where the defendant has wrongfully interfered with the claimant's rights as property owner and that interference is expected to continue: ***Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd [1953] Ch. 149,181(Pride of Derby)***. According to Evershed M.R.:

> *"It is, I think, well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered."*

[58] The **Pride of Derby** is distinguishable from the instant case and the case of **Mavis Rodney**. The court in the latter case had ample opportunity to lay down such a prima facie entitlement and did not. Indeed, to have done so would have required a

rather strained interpretation of the legislation entitling the respondents to lodge the caveat. Even in the **Pride of Derby** the court did not close out a consideration of the adequacy of damages as an alternate remedy. Therefore, the claimant in claims where the subject matter is land, must, like all others, demonstrate that compensatory damages would not be an adequate remedy. This is subject to one condition. That is, where there is this prima facie entitlement to an injunction, it is for the wrongdoer to satisfy the court that the special circumstance exists: ***Mackinnon Industries v Walker [1951] W.N. 401***. It therefore appears that there is no bias against a consideration of the adequacy of damages in the bosom of justice in favour of all claimants for injunctive relief where the subject matter is land.

[59] Let us consider some of the possible implications of such a general position, were it to be accepted as the law. The proposition contended for appears to be, where the claim concerns interests in land, namely that the claimant has a beneficial interest arising out of promissory and or proprietary estoppels, the claimant is entitled to an injunction. The court's task it appears would be restricted to identifying the class of the claim rather than any of the inquiries dictated by ***American Cyanamid v Ethicon.*** If there is to be a right to an injunction, then any investigation of the application for an injunction beyond identifying the nature of the right asserted would be otiose. Fundamentally, the court would have no discretion whether or not to grant the injunction, exploding the centuries old view that all equitable remedies are discretionary.

[60] What of the commercial implications? Whether sales of land could proceed could be plunged into uncertainty. How could the legal owner of property rest with confidence that his right to sell his property would not be interfered with if all a claimant had to do was to assert a beneficial interest springing from a promissory or proprietary estoppels? There could be no immediate relief by sale from a mortgage which had become burdensome. Similarly, the legal owner who wished to simply reorganise his financial affairs, to use the vogue expression, create some fiscal space, by the sale of property could be stopped in his tracks.

[61] Another consideration is would there be any distinction whether the representations are attributed to someone who is alive or to a deceased person? In the case of the former, the allegation that representations were made might be more easily refuted since that person would have to be a party to the claim. In the case of a deceased person, where there is so documentary support for the claim, refutation might be a little more problematic. In any event, the claimant would be entitled to an injunction irrespective of how slender a base his claim rest on. I have therefore come to the view that the acceptance of such a proposition has the potential to usher in chaos in both the law and commercial life.

[62] Having demonstrated that there is no such general proposition as contended for by the claimant, the judicial gaze is now adverted to the other contentions for the inadequacy of damages. First, that if the Edgecombe Property is sold the claimant's interest will be forever defeated. Respectfully, this is a contention which amounts to no more than a *non sequitur*. If the claimant succeeds in establishing an interest in the Edgecombe Property, that interest will not be immutable. English law recognises the conversion of an interest in real property to an interest in the proceeds of sale of that property. That is, the claimant's interest in the Edgecombe Property would then become a chose in action. It would only be the manner of enforcement of her right, if established, that would change, not the right itself. In other words, the claimant's personal right to the Edgecombe Property could only be enforced by action and not by taking possession: **Snell's Equity thirty-first edition page 27 para 3-01**. Therefore, any existing interest in the Edgecombe property cannot be defeated by its sale.

[63] Secondly, Mr Braham submitted that the claimant will be left without a home for herself and her two daughters if the defendants are permitted to sell the Edgecombe Property. The claimant herself said she has an emotional attachment to the Edgecombe Property. Taking the second limb first, the Edgecombe Property is a partially completed structure. It was never the home of the claimant and her children. It was never the family home with the sentimental attachment that that might bring. It is therefore difficult to conceive of this emotional attachment which the claimant asserted. That leaves the

submission of homelessness. Mrs Small-Davis' response that the claimant can purchase another property provides a complete answer.

[64] I am therefore of the view that the apprehended wrong to the claimant is not irreparable, in the sense of ***Watson v Durham University*****,** *ibid*. Equally, it is painfully obvious that the feared wrong sounds in the vein of the pecuniary. The only remaining question then is, is the contemplated damage susceptible to assessment? The court is not here dealing with anything in the nature of loss of goodwill**:** ***Foseco International Ltd v Fordath Ltd***, *ibid* or any other such imponderable. The subject matter of the claim is land, a thing to which value is as easily attached as a bow to an arrow or a sword to its sheath. I am accordingly constrained to accept the submission of learned counsel for the 2nd defendant that the damage to the claimant is a quantifiable one. I conclude that if the claimant is able to establish her claim to the Edgecombe Property at trial she would be adequately compensated by an award of damages for the value of her interest therein.

[65] I come now to the question of whether the 2nd defendant would be in a financial position to pay those damages. The claimant did not seek to say that the 2nd defendant would not be in a financial position to pay damages in the event of her success at trial, not even in the alternative. That is perhaps understandable having regard to the case argued on her behalf. Since that is where the matter was left, I am unable to say the 2nd defendant would not be in a position to pay the assessed damages. Therefore, since damages would be an adequate remedy, and the 2nd defendant was not shown to be in a financial position of inability to pay them, the application for an interim injunction is accordingly refused. Having so decided, it is unnecessary to go on to consider the question of the balance of convenience.

[66] I therefore make the following orders:

i. The application for an interim injunction is refused.

ii. Costs to the 2nd defendant to be taxed if not agreed.